Supreme Court, U.S.
FILED

011764 MAY 28 2002

OFFICE OF THE CLERK

01-

In The
Supreme Court of the United States

JOHN DAVIDSON,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for Writ of Certiorari To The
Arkansas Court of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, AR 72201
(501) 371-9131

Counsel of Record for
Petitioner

55 pgs

QUESTIONS PRESENTED

1. Particularity of description in a search warrant is a fundamental Fourth Amendment question that cannot be routinely bypassed by an appellate court in applying *Leon*'s good faith exception except for case-specific probable cause determinations; routinely doing so stifles the growth of the Fourth Amendment and evades judicial review.

2. The use of computerized boilerplate language in "particularly describing . . . the things to be seized" in a search warrant where there is no factual showing for those things violates the probable cause and particularity requirements of the Fourth Amendment.

LIST OF PARTIES

All the parties to this case are listed on the cover in the style of the case.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional Provision Involved 1

Statement 2

Reasons for Granting the Petition 7

I. The Court should grant certiorari to decide the appropriate scope of bypass of the merits of general warrant questions under *Leon*'s good faith exception or whether *Saucier v. Katz* requires that the merits always be decided before application of the good faith exception. 7

A. "To not decide is to decide" 7

B. Routinely bypassing the merits of a search warrant question to go directly to the good faith exception effectively approves of the disputed police action and creates a result *Leon* intended to avoid. 8

1. *Leon*'s paradox? 9

2. This case proves that bypassing the merits to apply the good faith exception leads to freezing the Fourth Amendment. 10

3. *Saucier v. Katz* now requires that the merits of non-case-specific Fourth Amendment claims be decided first. 10
4. Whether a search warrant is general is not an insubstantial question. 12
C. Conflicts in the courts 12
1. Conflict on the merits of the search 12
2. Conflict on skipping the merits 13
a. Merits first (Tenth Circuit and one state) 14
b. Good faith first (Fifth and Eighth Circuits, and some states) 14
3. This Court should resolve the conflict 16

II. The court should grant certiorari to decide whether computerized boilerplate language in search warrants not based on fact, but based merely on the officer's experience in drug cases, satisfies the probable cause and particularity of description clauses of the Fourth Amendment. 17
A. This is a computer-age general warrant 17
B. Particularity and probable cause are related questions and constitutionally intertwined since the Common Law; they serve the important constitutional function of defining the scope of search within the limits of the showing of probable cause. 18
C. This case enables the Court to rule on cut-and-paste warrants after *Leon* and *Sheppard*. 22
D. Other courts have dealt with the question presented, and the decision below results in a conflict of decisions. 23

Conclusion 26

Appendices 1a

Appendix A, *Davidson v. State,* 76 Ark. App. 464, 68 S.W.3d 331 (2002) 3a

Appendix B, *State of Arkansas v. Davidson,* CR2000-90, Suppression Hearing Proceedings, March 8, 2001 ..... 16a

TABLE OF AUTHORITIES

CASES:

Andresen v. Maryland, 427 U.S. 463 (1976) 18, 21

Bilbo v. State, 142 Ga. App. 716, 236 S.E.2d 847 (1977), *rev'd on other grounds*, 240 Ga. 601, 242 S.E.2d 21 (1978) 24

Boyd v. United States, 116 U.S. 616 20

Bruen v. Roe, 82 Eng. Rep. 1095 (K.B. 1665). 19

Chimel v. California, 395 U.S. 761 20

Commonwealth v. Dana, 43 Mass. 329 (1841) 20

Commonwealth v. Griffith, 19 Mass. 11 (1823) 20

Connor v. Commonwealth, 3 Binn. (Pa.) 38 (1810) 20

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 18, 20, 21

Davidson v. State, 76 Ark. App. 464, 68 S.W.3d 331 (2002) 1, 5

Entick v. Carrington, 19 Howell's St. Trials 1029, 95 Eng. Rep. 807 (K.B.1765) 19

Guerra v. State, 897 P.2d 447 (Wyo. 1995) 14

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 10

Illinois v. Gates, 462 U.S. 213 (1983) 8, 9, 11, 15

Katz v. United States, 389 U.S. 347 20

Marron v. United States, 275 U.S. 192 (1927) 20, 21

Maryland v. Garrison, 480 U.S. 79 (1987) 18,21,22

Massachusetts v. Sheppard, 468 U.S. 981 (1984) 17,18,22,23

McDonald v. United States, 335 U.S. 451 20

People v. Altman, 960 P.2d 1164 (Colo. 1998) ... 13, 14, 16

People v. Frank, 38 Cal.3d 711, 214 Cal.Rtpr. 801, 700 P.2d 415 (1985) 24

People v. Richbow, 2002 WL 343591 (Mich.App. 2002) 24

Polston v. Commonwealth, 255 Va. 500, 498 S.E.2d 924 (1998) 13, 16

Richards v. Wisconsin, 520 U.S. 385 (1997) 8, 12, 16

Rios v. State, 762 N.E.2d 153 (Ind.App.2002) 24

Robinette v. Ohio, 519 U.S. 33 (1996) 7

Saucier v. Katz, 533 U.S. 194 (2001) 7, 10, 11, 12, 16

Siegert v. Gilley, 500 U.S. 226 (1991) 11

Stanford v. Texas, 379 U.S. 476 21

State v. Rufus, 338 Ark. 305, 993 S.W.2d 490 (1999) 5

United States v. Brown, 69 F.Supp.2d 518 (S.D.N.Y.

1999) 13

United States v. Craig, 861 F.2d 818 (5th Cir.1988) 15

United States v. Dahlman, 13 F.3d 1391 (10th Cir. 1993), *cert. denied*, 511 U.S. 1045 (1994) 12, 14, 15

United States v. Dailey, 20 Fed. Appx. 686 (9th Cir. 2001) 13

United State v. Diaz-Lopez, 919 F.2d 741 (table), 1990 WL 194268 (9th Cir. 1990) 13

United States v. Foy, 28 F.3d 464 (5th Cir. 1994) 15, 16

United States v. Furlong, 844 F.Supp. 624, 631 (D.Mont. 1994), *aff'd in part, rev'd in part sub nom. United States v. Hand*, 61 F.3d 913 (table), 1995 WL 430568 (9th Cir. 1995), *cert. denied sub nom. United States v. Furlong*, 516 U.S. 999 (1995) 13

United States v. Garnett, 173 F.3d 857 (table), 1999 WL 196565 (6th Cir. 1999) 13

United States v. Graham, 998 F.Supp. 1460 (N.D.Ga. 1997), *aff'd*, 182 F.3d 937 (11th Cir. 1999) (table), *reh. denied*, 194 F.3d 1326 (11th Cir. 1999) (table) . 13

United States v. Guzman, 1998 WL 61850 (S.D.N.Y. 1998) 14

United States v. Hay, 231 F.3d 630 (9th Cir.2000) 24

United States v. Kouzmine, 921 F.Supp. 1131 (S.D.N.Y. 1996) 13

United States v. Leon, 468 U.S. 897 (1984) ..... *passim*

United States v. Livesay, 983 FR.2d 135 (8th Cir. 1993) . 16

United States v. Moland, 996 F.2d 259 (10th Cir. 1993) . 13

United States v. Pena-Rodriguez, 110 F.3d 1120 (5th Cir. 1997), *reh. denied*, 117 F.3d 1419 (5th Cir. 1997) (table), *cert. denied sub nom. United States v. Lied*, 522 U.S. 819 (1997) 15

United States v. Riley, 906 F.2d 841 (2d Cir. 1990) 13

United States v. Ross, 456 U.S. 798 (1982) 22

United States v. Rowland, 145 F.3d 1194 (10th Cir. 1998) 12, 24

United States v. Satterwhite, 980 F.2d 317 (5th Cir. 1992) 15

United States v. Ventresca, 380 U.S. 102 (1965) 17

United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996) . 12,24

United States v. Weber, 923 F.2d 1388 (9th Cir. 1991) . 18,23

United States v. Webster, 960 F.2d 1301 (5th Cir.), *cert. denied*, 506 U.S. 927 (1992). 16

United States v. Word, 1 Fed. Appx. 491 (7th Cir. 2001) . 13

United States v. Zayas-Diaz, 95 F.3d 105 (1st Cir. 1996) . 13

United States v. Zimmerman, 277 F.3d 426 (3d Cir. 2002) 24

Vance v. Terrazas, 444 U.S. 252 (1980) 7

Warden v. Hayden, 387 U.S. 294 20

Wells v. Jackson, 17 Va. 458 (1811) 20

Wilkes v. Wood, 19 Howell's St. Trials 1153, 98 Eng. Rep. 489 (K.B. 1763) 19

In re Young, 716 F.2d 493 (8th Cir. 1983) 24

CONSTITUTIONAL PROVISIONS:

Fourth Amendment, U.S. Constitution ..... *passim*

STATUTES AND RULES:

28 U.S.C. § 1257(a) 1

S.Ct. Rule 14.1(a) 7

OTHER AUTHORITIES:

CONDUCTOR GENERALIS 404-06 (1803) 19

WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791 (1990) ... 19

1 HALE, HISTORY OF THE PLEAS OF THE CROWN 576-80 (1736) 19

N.B. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 27 (1966) 20

J.W. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 35-37 (1937) 19, 20

2 LEGAL PAPERS OF JOHN ADAMS 144 (L. Wroth & H. Zobel eds. 1965) 19

M. Mertens & S. Wasserstom, *the Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 GEO. L.J. 365 (1981) 10

PETITION FOR WRIT OF CERTIORARI

Petitioner, John Davidson, respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Arkansas Court of Appeals affirming petitioner's conviction is reported at *Davidson v. State,* 76 Ark. App. 464, 68 S.W.3d 331 (2002). (App. A, *infra*, at 3a-15a)

JURISDICTION

The Arkansas Court of Appeals decided the appeal in this case on February 27, 2002. (App. A, *infra,* at 3a) This petition is filed within ninety days of that decision.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) involving final judgments of state courts and involving constitutional questions.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched and the persons or things to be seized.

STATEMENT

This is a search warrant case where the Arkansas Court of Appeals declined to reach the merits of a particularity of search question, skipping to the good faith exception instead. The result effectively decides the merits of the search against petitioner and sanctions the police conduct involved.

A. On the morning of July 7, 2000, there was a police helicopter marijuana spotting operation in rural Hempstead and Nevada Counties in Arkansas. Spotters in the air believed they saw marijuana plants growing in the bed of a trailer about 100 feet from petitioner's house near the Hempstead-Nevada county line. They radioed to the Nevada County Sheriff and his deputies on the ground who drove to petitioner's property and saw nineteen growing marijuana plants. The helicopter also landed on petitioner's property. Officers went to the petitioner's door and knocked. Petitioner eventually awoke and came to the door. He was *Mirandized* and asked about the plants, and he began to curse and denied ownership of them. Officers asked for consent to search the house, and petitioner refused. (App.A at 7a-8a)

An officer then went to get a search warrant. At the Drug Task Force office, the officer used a computer to prepare the affidavit and the warrant.

The affidavit for the search warrant stated all that the officers knew at the time. The entirety of "[t]he facts tending to establish the foregoing grounds for issuance of the Search Warrant are as follows" (spelling as in original; Record at 14):

> On Friday, July 7, 2000 Nevada County Sheriff's Department was flying for marijuana. At approximately 9:15am Hempstead County Sheriff's Deputy Franking McJunkins, which was in the helicopter, spotted green leafy plants in a stock trailer behind a pole barn at John Davidson's residence

East of State Highway 67. On arrival of Sheriff Steve Otwell, Chief Deputy Wally Huland, Deputy Larry Miller and this investigator, we walked out to the stock trailer and found five containers with nineteen (19) green leafy plants believed to be marijuana in side. When Sheriff Steve Otwell knocked on the back door and know one came to the door. Approximately ten (10) minutes later a white male came to the door identified himself as John Davidson. Sheriff Otwell verbally advised John Davidson of his Miranda Rights and asked him if he knew what was in the stock trailer and if the trailer was his. John Davidson stated that he did not know that was in the trailer, but the trailer was his. We walked out to the trailer and John Davidson stated that the plants were not his. Sheriff Otwell asked John Davidson if he would give consent to search his residence. John Davidson stated that we could not search is residence.

The officer then used boilerplate form language off the office computer for the particularity of description of what the officers would seek in their search. The entire list of what the officers were seeking in the search warrant is as follows:

1. Narcotics and/or compounds or derivatives thereof;
2. Scales, books, papers, records or narcotics notations, plastic baggies and any items which would be used to ingest narcotics and/or dangerous drugs into the human body.
3. Personal property tending to show residence on the premises and not limited to keys, safes, canceled mail, envelopes, rental agreements, receipts, bills for telephone and utility services, photographs, ledgers, phone lists, records of

> ownership to vehicles and personal property including clothing and/or jewelry, and any and all U.S. currency related to narcotics, any and all keys belonging to safe deposit boxes, bank books, bank records, ledgers (as it has been my training and experience that subjects dealing in profits keep ledgers), personal property affects such as non-cash items used to pay for narcotics, such as radios, scanners, jewelry, televisions, firearms, etc.

(*Id.* at 8a-9a; Record at 16)

The search of petitioner's house produced guns and ammunition, cocaine, methamphetamine, marijuana, drug paraphernalia, and money. Petitioner was charged with drug and weapons offenses resulting from the search of his property.

Petitioner moved to suppress the search of his property as violating the Fourth Amendment[1] because of a failure to show probable cause for the listed contents of the house,[2] and a suppression hearing was held. The officer testified at the suppression hearing that the three paragraphs on one form were developed from his training and experience and were what he expected to find in a search of the premises in drug cases. He also testified that this was standard language in all drug search warrants in that county. (*Id.* at 9a) The motion to suppress was denied. (App.B. at 16a)

---

[1] The motion to suppress did not challenge the entry of the police onto his property by driving in and by landing the helicopter which led to specific observations. The motion also did not challenge the reasonableness of the height of the flyover.

[2] It is arguable that the affidavit showed probable cause to believe that marijuana would be found in the house, considering the fact that nineteen plants were found growing outside. There is not one word in the affidavit, however, showing that anything in ¶s 2 & 3 of the warrant description would be found.

Petitioner was tried and convicted based on what was found in his house,[3] and he was sentenced to a total of 41 years for possession of cocaine, possession of methamphetamine, possession of marijuana with intent to deliver, possession of drug paraphernalia, and possession of prohibited weapons. (*Id.* at 7a)

B. Petitioner appealed his conviction to the Arkansas Court of Appeals, challenging the trial court's suppression ruling under the probable cause and particularity clauses of the Fourth Amendment. *Davidson v. State,* 76 Ark. App. 464, 68 S.W.3d 331 (2002). (App. A, *infra*, at 3a-15a)

The Arkansas Court of Appeals explained the legal principles involved that "the duty of the reviewing court is to simply insure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." (App.A at 11a, quoting *State v. Rufus,* 338 Ark. 305, 312, 993 S.W.2d 490, 494 (1999))

The Court of Appeals explained the positions of the parties on the probable cause for the particularity of description argument, but declined to even decide the merits of the search:

> Appellant argues that the search warrant should not have been issued because it could not be inferred from the affidavit that the items listed in the warrant could be found in appellant's home. Thus, he argues that this warrant was based upon speculation and conclusory language, not facts. Appellant recognizes that computer-generated language is not fatal per se when that language is coupled with additional facts to support a reasonable belief that contraband will

---

[3] Petitioner was acquitted of manufacturing marijuana from the growing plants and simultaneous possession of drugs and firearms. (Record at 501)

> be found. . . . However, he notes that the success of the search will not validate the search if it was unlawful in its inception.
>
> The State, while not agreeing that the warrant was deficient, asserts that the "good-faith exception" enunciated in *United States v. Leon*, 468 U.S. 897 (1984), would support denial of the motion to suppress. Therefore, it posits that if the officers relied in good faith on the issuance of the search warrant by the magistrate based upon the magistrate's flawed determination of probable cause, then the fruits of the search are not subject to suppression. In answering whether the officer is acting in good faith, the analysis requires an objective standard, which requires the officers to have a reasonable knowledge of the Arkansas Rules of Criminal Procedure. . . . We agree with the State that the good-faith exception would support the denial of suppression in this instance. Thus, we need not address the existence of probable cause to issue the warrant.

(App.A at 11a-12a (citations omitted))

Accordingly, the Court of Appeals affirmed petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE APPROPRIATE SCOPE OF BYPASS OF THE MERITS OF GENERAL WARRANT QUESTIONS UNDER *LEON*'S GOOD FAITH EXCEPTION OR WHETHER *SAUCIER V. KATZ* REQUIRES THAT THE MERITS ALWAYS BE DECIDED BEFORE APPLICATION OF THE GOOD FAITH EXCEPTION.

A. "To not decide is to decide"

By not deciding the merits of the particularity question, petitioner submits that the Arkansas Court of Appeals has effectively decided the question[4] and sanctioned all use of boilerplate computerized particularity language in Arkansas. In this context, application of the good faith exception is proof in action of the proverb "To not decide is to decide."

With the decision below, as long as the appellate courts refuse to decide the merits of important constitutional questions, officers will never *not* be acting in good faith. This is contrary to the constitutional role of the courts and their duty of judicial review.

Petitioner submits that the decision of the Arkansas Court of Appeals is directly contrary to *Saucier v. Katz,* 533 U.S. 194 (2001), and implicitly contrary to *United States v. Leon,* 468 U.S. 897 (1984). Petitioner submits that *Saucier* requires

---

[4] Petitioner often states that the decision below "decided" the merits question. In light of application of the good faith exception, petitioner submits that the question has effectively been decided against him such that he can seek review of the merits of the question, which is the Second Question Presented, because it is a "'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'" *Robinette v. Ohio,* 519 U.S. 33, 37 (1996), quoting S.Ct. Rule 14.1(a) and *Vance v. Terrazas,* 444 U.S. 252, 258-59 n. 5 (1980).

that this Court hold that the merits of the Fourth Amendment claim must be decided before turning to the application of the good faith exception. It is also directly contrary to decisions of other courts.

B. Routinely bypassing the merits of a search warrant question to go directly to the good faith exception effectively approves of the disputed police action and creates a result *Leon* intended to avoid.

Leon made it clear that good faith issues may be resolved alone if the Fourth Amendment merits question is "insubstantial." *Id.*, 468 U.S. at 924 & n. 25; *see Illinois v. Gates*, 462 U.S. 213, 264-65 (1983) (WHITE, J., concurring). This begs the question: What is an insubstantial Fourth Amendment question? Should *Leon* be limited to case-specific probable cause questions?

This Court in *Leon* may have left a paradox that petitioner submits must now be resolved. The Court on the one hand said that it is not signaling its unwillingness to enforce the Fourth Amendment, but on the other suggests that good faith should be easier for the prosecution to prove than the merits.

The effect here is that an appellate court can simply refuse to decide the merits of a search, skipping ahead to determining objective good faith. The result will be that the disputed police conduct is thereby implicitly approved for all law enforcement officers for the future because they will not be not acting in objective good faith as long as the officers in the prior case were acting in good faith. This is, however, even contrary to the qualified immunity cases. *Saucier v. Katz*, 533 U.S. at 201 (also, a case in point is not required to find the law "well settled" for objective reasonableness). And, such a "blanket rule impermissibly insulates these cases from judicial review." *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997). Thus, the development of Fourth Amendment jurisprudence is

stifled—a result never intended by *Leon*.

Petitioner submits that subsequent developments in other areas require that this Court hold that the merits of the Fourth Amendment claim must be decided before turning to the application of the good faith exception.

1. *Leon*'s paradox?

Leon, 468 U.S. at 924, says:

> As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.
>
> Nor are we persuaded that application of a good-faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated.

Justice WHITE's thinking on this score is found in his concurring opinion in *Illinois v. Gates* 462 U.S. at 264-66, the Term before he wrote *Leon,* where he opined that case-specific probable cause determinations should be the primary vehicle for bypassing the merits and going straight to the good faith exception because that question is limited to the case at hand.

2. This case proves that bypassing the merits to apply the good faith exception leads to freezing the Fourth Amendment.

The result here is exactly what the Court in *Leon* said it was trying to avoid.

While the merits of the issue of the particularity of computer generated form language appears on the surface to simply have been left unresolved, petitioner submits that it was effectively decided for all officers in future cases because the State can now cite this case to support the warrant or at least the officers' good faith. What all courts should do is decide the merits of the search and *then* look to objective good faith. If petitioner won on the merits but lost on the good faith exception, the next time officers cannot claim good faith because they will be on notice. The result is that Fourth Amendment jurisprudence is advanced because the merits of the search have been resolved.

The result here, however, is that the Fourth Amendment essentially is impermissibly frozen on this point.[5]

3. *Saucier v. Katz* now requires that the merits of non-case-specific Fourth Amendment claims be decided first.

The genealogy of *Leon*'s objective reasonableness standard includes the qualified immunity case of *Harlow v. Fitzgerald,* 457 U.S. 800, 815-19 (1982). *Leon,* 468 U.S. at 922. In the qualified immunity cases, this Court now requires that the merits of the challenged official conduct be decided before

---

[5] This was the argument against the good faith exception in M. Mertens & S. Wasserstom, *the Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 GEO. L.J. 365, 449-53 (1981).

turning to the question of whether the officer's conduct was objectively reasonable, and this is a necessary requirement of the development of the law from case to case. *Saucier v. Katz,* 533 U.S. at 201:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show that the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). In the course of determining whether a constitutional right was violated . . . , a court might find it ~~nece~~essary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court to simply skip ahead to the question of whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

There is no constitutional justification for requiring a different resolution of the merits in a Fourth Amendment qualified immunity case where money is at issue, but not in a Fourth Amendment criminal case where liberty is at issue. Petitioner submits that *Saucier*, read in context with Justice WHITE's opinions in *Leon* and *Gates*, now requires that the merits of Fourth Amendment claims be decided before a trial or appellate court can turn to the application of the good faith exception, except perhaps where there is a case-specific probable cause question. To do otherwise impermissibly evades judicial review of a whole class of Fourth Amendment cases.

See Richards v. Wisconsin, supra.

4. Whether a search warrant is general is not an insubstantial question.

A general search warrant allegation should seldom be considered insubstantial, considering the fact that it is one of the primary reasons we have a Fourth Amendment. *See* Point II, *infra.*

C. Conflicts in the courts

1. Conflict on the merits of the search

United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996), is practically identical to this case on the issues, and the Sixth Circuit held that the use of boilerplate alone was constitutionally insufficient. "The use of generalized boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct engenders the risk that insufficient 'particularized facts' about the case or the suspect will be presented for a magistrate to determine probable cause." *Id.* at 1378. After a detailed analysis, the court found that the affidavit was only "bare bones" and thus failed to provide probable cause. *Id.* at 1379-80. The court then turned to the good faith exception and found that it was inapplicable as well because the affidavit was "bare bones." *Id.* at 1380-81.[6] *See Leon,* 468 U.S. at 914-15.

---

[6] *United States v. Rowland,* 145 F.3d 1194, 1205 (10th Cir. 1998), is also similar. There, the Tenth Circuit held that the affidavit failed to show probable cause to believe that child pornography obtained on defendant's arrest at his post office was going to defendant's home to justify search of his home, and it suppressed. *See also United States v. Dahlman, infra* (checking box for place to be searched on boilerplate part of warrant cannot automatically autho-

2. Conflict on skipping the merits

Following *Leon,* some cases sanction bypass of the merits of Fourth Amendment claims,[7] only some of them involving case-specific probable cause determinations.[8] Three federal circuits have diametrically opposed positions.

---

rize search of that place).

In another similar case, the Sixth Circuit addressed the merits of the search question against the defendant and, thus, never had to reach the application of the good faith exception. *United States v. Garnett,* 173 F.3d 857 (table), 1999 WL 196565, **2 & n. 6 (6th Cir. 1999).

[7] *See, e.g., United State v. Diaz-Lopez,* 919 F.2d 741 (table), 1990 WL 194268 (9th Cir. 1990); *United States v. Moland,* 996 F.2d 259, 261 (10th Cir. 1993) (pre-*Dahlman*) (violation of knock-and-announce requirement); *United States v. Brown,* 69 F.Supp.2d 518, 520-21 (S.D.N.Y. 1999) (knock-and-announce); *United States v. Furlong,* 844 F.Supp. 624, 631 (D.Mont. 1994) (application of state law to federal search), *aff'd in part, rev'd in part sub nom. United States v. Hand,* 61 F.3d 913 (table), 1995 WL 430568 (9th Cir. 1995), *cert. denied sub nom. United States v. Furlong,* 516 U.S. 999 (1995).

[8] *See, e.g., United States v. Word,* 1 Fed. Appx. 491, 493 (7th Cir. 2001); *United States v. Dailey,* 20 Fed. Appx. 686, 686 (9th Cir. 2001); *United States v. Graham,* 998 F.Supp. 1460, 1464-65 (N.D.Ga. 1997), *aff'd,* 182 F.3d 937 (11th Cir. 1999) (table), *reh. denied,* 194 F.3d 1326 (11th Cir. 1999) (table); *People v. Altman,* 960 P.2d 1164, 1169-70, 1172 (Colo. 1998).

See United States v. Zayas-Diaz, 95 F.3d 105, 112-13 (1st Cir. 1996) (staleness claim); *United States v. Riley,* 906 F.2d 841, 846 (2d Cir. 1990) (rejecting overbreadth claim); *United States v. Kouzmine,* 921 F.Supp. 1131, 1134 (S.D.N.Y. 1996) (same); *Polston v. Commonwealth,* 255 Va. 500, 504, 498 S.E.2d 924, 926 (1998) (regardless of merits, "[t]he evils identified in the *Leon* test are simply not present here"; good faith exception applied even assuming no probable cause).

a. Merits first (Tenth Circuit and one state)

The Tenth Circuit has held that the merits of search warrant questions should be resolved before turning to good faith to prevent impeding the development of Fourth Amendment jurisprudence.

> [W]hile [*Leon*] intended to vest lower courts with discretion, the preferred sequence is to address the Fourth Amendment issues before turning to the good faith issue unless there is no danger of 'freezing' Fourth Amendment jurisprudence or unless the case poses 'no important Fourth Amendment questions.' *See Leon,* 468 U.S. at 924-925, 104 S.Ct. at 3421-3422."

United States v. Dahlman, 13 F.3d 1391, 1397 (10th Cir. 1993), *cert. denied,* 511 U.S. 1045 (1994) (bracketed material added). *Dahlman* also involved warrant particularity and other Fourth Amendment questions.

Wyoming is in accord. *Guerra v. State,* 897 P.2d 447, 458-59 (Wyo. 1995).[9]

b. Good faith first (Fifth and Eighth Circuits, and some states)

The Fifth Circuit, on the other hand, requires

a two-step review of a district court's denial of a

---

[9] *Accord: United States v. Guzman,* 1998 WL 61850, *5 (S.D.N.Y. 1998).

Colorado in also in the Tenth Circuit and borders Wyoming, but it follows the opposite analysis of good faith first. *People v. Altman, infra.*

> motion to suppress. *United States v. Satterwhite,* 980 F.2d 317, 320 (5th Cir. 1992). The first step requires the court to determine whether the good-faith exception to the exclusionary rule applies. *See United States v. Leon,* 468 U.S. 897, 922-23, 104 S.Ct. 3405, 3420-21, 82 L.Ed.2d 677 (1984). The second step requires the court "to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed." *Illinois v. Gates,* 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332-33, 76 L.Ed.2d 527 (1983) (internal quotation omitted). If the good-faith exception applies, the court need not reach the question of probable cause. *Satterwhite,* 980 F.2d at 320; *see also United States v. Craig,* 861 F.2d 818, 820 (5th Cir.1988) ("Principles of judicial restraint and precedent dictate that, ~~in most cases,~~ we should not reach the probable cause issue if a decision on the admissibility of the evidence under the good-faith exception of *Leon* will resolve the matter").

United States v. Pena-Rodriguez, 110 F.3d 1120, 1129-30 (5th Cir. 1997), *reh. denied,* 117 F.3d 1419 (5th Cir. 1997) (table), *cert. denied sub nom. United States v. Lied,* 522 U.S. 819 (1997).

The Fifth Circuit also holds that

> [t]he only instances in which this maxim should not be followed are those in which the resolution of a "novel question of law . . . is necessary to guide future action by law enforcement officers and magistrates." *Craig,* 861 F.2d at 820-21 (quoting *Gates,* 462 U.S. at 264, 103 S.Ct. at 2346 (White, J., concurring)).

Id., 110 F.3d at 1130 n. 10. *Accord: United States v. Foy,* 28

F.3d 464, 474 (5th Cir. 1994); *United States v. Webster,* 960 F.2d 1301, 1307 (5th Cir.), *cert. denied,* 506 U.S. 927 (1992). By only reaching the merits on "novel question[s]" of Fourth Amendment jurisprudence, the Fifth Circuit is working to freeze development of the Fourth Amendment contrary to *Leon.*

The Eighth Circuit also is in accord, but it does not articulate its rule the same way. *United States v. Livesay,* 983 FR.2d 135, 137 (8th Cir. 1993) (good faith first, except in unusual circumstances). The Colorado and Virginia Supreme Courts also appear to be in accord. *People v. Altman,* note 8, *supra; Polston v. Commonwealth,* note 8, *supra.* Arkansas has apparently joined them.

3. This Court should resolve the conflict

In the interest of "the process for the law's elaboration from case to case"; *Saucier,* 533 U.S. at 201; and the in the interest of not having this constitutional issue evade review; *Richards v. Wisconsin,* 520 U.S. at 393; certiorari should be granted to resolve this conflict.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER COMPUTERIZED BOILERPLATE LANGUAGE IN SEARCH WARRANTS NOT BASED ON FACT, BUT BASED MERELY ON THE OFFICER'S EXPERIENCE IN DRUG CASES, SATISFIES THE PROBABLE CAUSE AND PARTICULARITY OF DESCRIPTION CLAUSES OF THE FOURTH AMENDMENT.

A. This is a computer-age general warrant

This case presents the computer-age version of a general warrant where no facts in the affidavit support two paragraphs of the description of the "things to be seized." This question is "fairly included" in the good faith exception issue because it was effectively decided in this case. *See* note 4, *supra.*

Every police department now has computers that officers can use to prepare search warrant papers. We immediately assume that computers will ease the obtaining of search warrants and hopefully enhance "[t]he right of the people to be secure" by enabling police officers to more readily obtain specific and valid search warrants by facilitating production of the necessary paperwork for the magistrate to review.[10]

But, there is a serious constitutional downside to the use of computers: The prevalence and ease of use of computers can also make officers complacent in their role[11] and less inclined to even think about protecting privacy rights. A simple

---

[10] *Compare United States v. Ventresca,* 380 U.S. 102, 106 (1965) (preference for a search warrant is so strong that in a doubtful case a search under a warrant will be sustainable where a search without a warrant will fail), and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984) (not unconstitutional to erroneously leave drug clause in preprinted form for warrant in homicide case; good faith exception saved search) (discussed *infra*).

[11] The affidavit here apparently was not proofread. That also happened with the warrant in *Sheppard.*

cutting and pasting from a prior affidavit to another and a prior warrant to another in many cases can easily lead to unconstitutional results if, as happened here, the officer cuts and pastes without regard to the facts. Thus, *Massachusetts v. Sheppard,* 468 U.S. 981 (1984), is significantly different. As two federal circuits have put it, "[r]ambling boilerplate recitations designed to meet all law enforcement needs" do not produce probable cause; *see, e.g., United States v. Weber,* 923 F.2d 1388, 1395 (9th Cir. 1991); and others are in accord.

This affidavit for warrant fails that requirement because the officer articulated no facts and thus no probable cause whatsoever to believe that any particular thing would be found in petitioner's house. *See* note 2, *supra.*

The Common Law and the history of the Fourth Amendment make clear that probable cause and particularity of description of the place to be searched and the thing to be seized are related constitutional questions designed to protect against general searches. Thus, the decision below is contrary to the decisions of this Court and conflicts with decisions of other federal and state appellate courts thereby warranting this Court granting certiorari.

B. Particularity and probable cause are related questions and constitutionally intertwined since the Common Law; they serve the important constitutional function of defining the scope of search within the limits of the showing of probable cause.

The Fourth Amendment requires that the warrant "particularly describ[e] . . . the . . . things to be seized." In *Coolidge v. New Hampshire,* 403 U.S. 443 (1971) (plurality opinion), *Andresen v. Maryland,* 427 U.S. 463 (1976), and *Maryland v. Garrison,* 480 U.S. 79 (1987), the Court explained that probable cause to search and particularity of the warrant are really two intertwined questions: probable cause defines the particu-

larity and scope of the search. They protect against general searches so "abhorred by the colonists" and the drafters of the Fourth Amendment. *Coolidge,* 403 U.S. at 467, quoted *infra.*

The later Common Law at the time of the adoption of the Fourth Amendment showed that particularity of description and probable cause were related questions intended to protect against general searches, which were finally considered oppressive by the time of the American Revolution. *See, e.g., Entick v. Carrington,* 19 Howell's St. Trials 1029, 1046, 1056-57, 1059-1074, 95 Eng. Rep. 807 (K.B.1765); *Wilkes v. Wood,* 19 Howell's St. Trials 1153, 98 Eng. Rep. 489 (K.B. 1763); CONDUCTOR GENERALIS 404-06 (1803)[12]; 2 LEGAL PAPERS OF JOHN ADAMS 144 (L. Wroth & H. Zobel eds. 1965)[13]; 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 576-80 (1736); WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791, ch. 5-7, 13-18, 23 (1990)[14]; J.W. LASSON, THE HISTORY AND DEVELOPMENT

---

[12] *Id.* at 404:

> [Search warrants] are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do show his reason of such suspicion; for these warrants are judicial acts, and must be granted upon examination of the fact.
>
> This observed, the justice may issue his warrant to search in such particular places, whereof, the party assigns probable cause of suspicion. (bracketed material added)

[13] Discussing James Otis's argument in *Petition of Lechmere (Paxton's case),* argued in Boston in 1761.

[14] The necessity of specific information tied to specific places came in England by statute and case law before 1700. 2 CUDDIHY 633-35 & 862, citing *Bruen v. Roe,* 82 Eng. Rep. 1095 (K.B. 1665).

Immediately after the American Revolution, probable cause

OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 35-37 (1937); N.B. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 27 (1966).[15]

> [There are] two distinct constitutional protections served by the warrant requirement. First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. See, e.g., *McDonald v. United States,* 335 U.S. 451; *Warden v. Hayden,* 387 U.S. 294; *Katz v. United States,* 389 U.S. 347; *Chimel v. California,* 395 U.S., at 761-762. The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. See, e.g., *Boyd v. United States,* 116 U.S., at 624-630; *Marron v. United States,* 275 U.S. 192,

---

and particularity had merged, and the general warrant was fully rejected. By 1782, particularity for the thing to be seized was fully recognized by state statutes. 3 CUDDIHY ch. 23, at 1341-42.

[15] *See Wells v. Jackson,* 17 Va. 458, 473 (1811) (general warrants "grievous, oppressive, and unconstitutional"; magistrate judges determine what will be seized based on what is shown); *Connor v. Commonwealth,* 3 Binn. (Pa.) 38, 43 (1810) (no public safety exception to the probable cause or oath requirement, or the protection against search and seizure would be a "dead letter"); *Commonwealth v. Griffith,* 19 Mass. 11, 17 (1823) (writs of assistance "which caused so much excitement before the American Revolution, were unconstitutional, because they were general in nature"); *Commonwealth v. Dana,* 43 Mass. 329, 335-36 (1841).

195-196; *Stanford v. Texas,* 379 U.S. 476. The warrant accomplishes this second objective by requiring a "particular description" of the things to be seized.

Coolidge, 403 U.S. at 467 (bracketed material added).[16]

In *Andresen v. Maryland,* 427 U.S. at 480, the Court again held that the particularity clause is intended to prevent a general search by imposing limits in the warrant:

> General warrants, of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se,* but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Coolidge v. New Hampshire,* 403 U.S. 443, 467. . . . This requirement " 'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " *Stanford v. Texas* 379 U.S. 476, 485 . . . quoting *Marron v. United States,* 275 U.S., at 196. (bracketed material in original)

This was further explained in *Maryland v. Garrison,* 480 U.S. at 84-85, that the showing of probable cause determines the scope of a search:

> The Warrant Clause of the Fourth Amendment

---

[16] *See Marron v. United States,* 275 U.S. 192, 196 (1927) (Congress in enacting the search warrant law was careful to require both probable cause and particularity; nothing is left to discretion of the officer).

> categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus, the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." *United States v. Ross,* 456 U.S. 798, 824 (1982). (footnote omitted)

Thus, before a search warrant may issue, the magistrate has to be provided probable cause to believe both that (1) particularly described things (2) will be found in the place to be searched.

While *Garrison* seems clear enough, this case enables the Court to be more specific. It gives the Court the opportunity to resolve this question in light of the current tendency of law enforcement officers to cut-and-paste warrant clauses from prior search warrants.

C. This case enables the Court to rule on cut-and-paste warrants after *Leon* and *Sheppard.*

Leon's companion case, *Massachusetts v. Sheppard* is

somewhat similar, but it involved a highly specific showing of probable cause for items to be seized based on investigation where this case does not. *Sheppard* was a homicide case which involved a preprinted affidavit form for controlled substances altered on a typewriter. The affidavit was quite specific as to evidence of a homicide and marijuana. The warrant part of form, however, was not altered when signed, and it did not specifically incorporate the detailed list of items sought from the affidavit. The Massachusetts court suppressed the search, but this Court held that the good faith exception saved the search because reliance on the warrant was objectively reasonable, considering that a district attorney and judge reviewed the papers and made changes before the warrant was issued. *Sheppard,* 468 U.S. at 989.

The affidavit in this case, however, was sparse compared to *Sheppard;* it provided no showing of probable cause to search the house for all the items sought, and it did not include a specific description of items based on the officer's investigation. Instead, it was a cut-and-paste of hoped-for items, based solely on the officer's experience as to what might be found in a drug case in Nevada County, Arkansas, and not upon articulated fact as in *Sheppard.*

D. Other courts have dealt with the question presented, and the decision below results in a conflict of decisions.

Several appellate courts have dealt with the Second Question Presented of whether boilerplate language satisfies the Fourth Amendment. Courts generally state that the use of boilerplate language is to be avoided because it fails to protect privacy rights and leads to general searches.[17] They are not,

---

[17] *See, e.g., Weber,* 923 F.2d at 1345 ("Rambling boilerplate recitations designed to meet all law enforcement needs" do not

however, *per se* unconstitutional, and the courts look to whether there otherwise is factual support for the scope of the search.[18]

---

produce probable cause), quoted in *United States v. Zimmerman,* 277 F.3d 426, 433 n. 4 (3d Cir. 2002) (good faith exception did not save that search); *Weaver,* 99 F.3d at 1378 ("The use of generalized boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct engenders the risk that insufficient 'particularized facts' about the case or the suspect will be presented for a magistrate to determine probable cause."); *In re Young,* 716 F.2d 493, 500 (8th Cir. 1983) (holding unacceptable under *Gates* an FBI affidavit of "broad, boilerplate statement describing in a general way the applications, reports, and records that are commonly kept in bail bond operation."); *People v. Frank,* 38 Cal.3d 711, 723-28, 214 Cal.Rtpr. 801, 806-10, 700 P.2d 415, 420-24 (1985) (papers could not be seized under boilerplate language in warrant; not one fact shown in affidavit justified the boilerplate; warrant sanctioned exploratory search without probable cause for what was being explored for); *Bilbo v. State,* 142 Ga. App. 716, 719, 236 S.E.2d 847, 850 (1977) ("Forms and 'boilerplate' constructions may have their place in the world of security agreements, deeds, contracts, and even indictments may have its place in security agreements, but not in search warrants, but they have no place where circumstances must be presented to a magistrate or judge for independent determinations of probable cause on a case-by-case basis."), *rev'd on other grounds,* 240 Ga. 601, 242 S.E.2d 21 (1978) (wiretap application); *Rios v. State,* 762 N.E.2d 153, 160 (Ind.App.2002).

[18] *Compare United States v. Hay,* 231 F.3d 630, 636 (9th Cir.2000) (boilerplate based on officer's experience on what would be found in search of house and computer in child pornography cases was sufficient in this case), *with Rowland,* 145 F.3d at 1205 (affidavit failed to show reason to believe that child pornography obtained at post office was going to defendant's home to justify search of home after arrest at post office); *People v. Richbow,* 2002 WL 343591, *4 (Mich.App. 2002) ("We have no quarrel with the circuit court's comment that boilerplate language inserted into

This search warrant fails the requirement of probable cause and particularity because its recitation is pure boiler-plate with no facts shown in the affidavit to authorize such a broad search of petitioner's house. This is the computer-age version of the general warrant, and certiorari should be granted to resolve the Second Question Presented.

---

many affidavits has virtually no relevance to probable cause in a particular case. However, we conclude that the remaining material was sufficient to show probable cause.").

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131
Counsel of Record for Petitioner

APPENDICES

Appendix A, *Davidson v. State,* 76 Ark. App. 464, 68 S.W.3d 331 (2002) 3a
Appendix B, *State of Arkansas v. Davidson,* CR2000-90, Suppression Hearing Proceedings, March 8, 2001 .. 16a

APPENDIX A

John DAVIDSON *v.* STATE of Arkansas
76 Ark. App. 464 [*], 68 S.W.3d 331 [**][†]
Court of Appeals of Arkansas
Division I; CA CR 01-713
Opinion delivered February 27, 2002

1. **Motions – ruling on motion to suppress – standard of review.** – When the appellate court reviews a trial court's ruling on a motion to suppress, it reviews the evidence and makes an independent determination based upon the totality of the circumstances; a trial court's ruling on a motion to suppress will be reversed only if the ruling was clearly erroneous.
2. **Criminal procedure – warrant affidavit – adequacy of.** – In determining the adequacy of an affidavit used in an application for a search warrant the task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place; the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
3. **Evidence – proving fact by circumstantial evidence – circumstances proven must lead to conclusion with reasonable certainty.** – Although the existence of a fact may be proved by circumstances as well as by direct evi-

---

[†] The headnotes are provided by the Arkansas Supreme Court reporter of decisions, and they are not the same as the headnotes in S.W.3d.

dence, the circumstantial evidence must be sufficient to lead to the inference; where circumstantial evidence is relied upon to establish a fact, the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. -

4. **Search & seizure – issuance of warrant – computer generated language not fatal per se.** – Computer-generated language in an affidavit for a search warrant is not fatal per se when that language is coupled with additional facts to support a reasonable belief that contraband will be found.

5. **Search & seizure – unlawful search – success of search will not validate.** – The success of the search will not validate the search if it was unlawful in its inception.

6. **Search & seizure – "good-faith exception" will support denial of motion to suppress – determination of whether officer acted in good faith.** – The "good-faith exception" enunciated in *United States v. Leon*, 468 U.S. 897 (1984), supports denial of a motion to suppress; if officers relied in good faith on the issuance of the search warrant by the magistrate based upon the magistrate's flawed determination of probable cause, then the fruits of the search are not subject to suppression; in answering whether the officer acted in good faith, the analysis requires an objective standard, which requires the officers to have a reasonable knowledge of the Arkansas Rules of Criminal Procedure.

7. **Search & seizure – "good-faith exception" supported denial of motion to suppress – existence of probable cause to issue warrant not addressed.** – Where the good-faith exception supported the denial of appellant's motion to suppress, the appellate court did not need to address the existence of probable cause to issue the warrant.

8. **Search & seizure – "good-faith exception" – four er-**

rors that officer's objective good faith cannot cure. – There are four errors that an officer's objective good faith cannot cure; these errors occur (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) when the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid.

9. **Search & seizure – purpose of exclusionary rule – application should have deterrent effect.** – The purpose of the exclusionary rule is to deter police misconduct; because the goal of the exclusionary rule is to deter future police misconduct, it only makes sense to apply the rule where its application has a deterrent effect, and where officers acted in objective good faith or where the transgressions are minor, the magnitude of the benefit conferred upon guilty defendants offends the basic concepts of the justice system.
10. **Search & seizure – arrest warrant – officer cannot be expected to question magistrate's probable-cause determination.** – In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically correct; thus, once the warrant issues, there is literally nothing more the officer can do in seeking to comply with the law.
11. **Search & seizure – denial of motion to suppress – affirmed.** – The trial court's denial of appellant's motion to suppress was affirmed where the police knew that there were growing marijuana plants in plain view on a trailer bed approximately 100 feet from the residence on appellant's property, where appellant was at home in his residence and claimed ownership of the trailer, and where, although the sheriff believed he already had prob-

able cause to search, law enforcement officers waited until they had procured a warrant before searching the premises.

12. **Criminal law – imposition of concurrent or consecutive sentences – solely within trial court's discretion.** – Arkansas Code Annotated section 5-4-403 (Repl. 1997) states in part that "when multiple sentences of imprisonment are imposed on a defendant convicted of more than one offense ... the sentences shall run concurrently unless the court orders the sentences to run consecutively"; it is solely within the trial court's discretion whether to sentence a defendant to serve concurrent or consecutive sentences.

13. **Criminal procedure – challenge to trial judge's determination that sentences should run consecutively – nothing in record to demonstrate that trial judge did not exercise his discretion.** – The appellant, by challenging the trial judge's sentencing determination, assumed the burden of showing that the trial judge failed to give due consideration in the exercise of his discretion; here there was nothing in the record to demonstrate that the trial judge did not exercise his discretion; indeed, he obviously exercised discretion when he departed from the jury's recommendation that the sentences be served concurrently; it is when the trial judge has a standard manner of sentencing or merely implements whatever the jury wants that the appellate court steps in and remands for resentencing.

14. **Criminal procedure – sentences were within statutory minimum & maximum – no abuse of discretion found.** – The appellate court, upon considering that the sentences given appellant were within the statutory maximum and minimum, and that the trial judge contemplated whether to "stack" them or not, found it abundantly clear that the trial judge exercised discretion when sentencing, and the appellate court found no abuse of discretion in

that exercise.

Appeal from Nevada Circuit Court; *James Houston Gunter, Jr.*, Judge; affirmed.

[*332, ** 467] *Keil & Goodson,* by: *John C. Goodson,* for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman,* Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant John William Davidson appeals his convictions for possession of cocaine, possession of methamphetamine, possession of marijuana with intent to deliver, possession of drug paraphernalia, and possession of prohibited weapons. He was sentenced to four ten-year and one one-year prison terms, respectively, which the trial judge ordered to run consecutively for a forty-one-year prison sentence. He appeals arguing that the trial court erred in (1) denying his motion to suppress, and (2) abusing its discretion or failing to exercise its discretion in ordering the sentences to be served consecutively. We disagree with his arguments and affirm his convictions.

The following events led to the request for a search warrant to search appellant's home. On the morning of July 7, 2000, a Hempstead County sheriff's investigator participated in a helicopter patrol over Hempstead County including the rural sections of the county. Near the Hempstead and Nevada County line, the investigator observed several containers of what appeared to be marijuana plants on the bed of a trailer parked behind a barn, which was approximately 100 feet from appellant's house. There appeared to be a water hose running from the house to the trailer holding the plant containers. The investigator contacted the Nevada County Sheriff [*333] at approximately 9:15 a.m., telling the sheriff what was observed. The sheriff and three deputies drove to appellant's house, walked to [**468] the trailer, and observed nineteen plants that they believed to be marijuana growing in five con-

tainers. The sheriff then walked to the residence and knocked on the doors, but he received no response. After about ten minutes elapsed, appellant awoke, came out of the house, and was read his Miranda rights by the sheriff. When asked whose trailer it was, appellant replied that it was his. Appellant denied knowing what was on the trailer, and when he was shown the plants, he began to curse and disclaimed ownership of them. The sheriff asked for consent to search the house, but it was denied. Appellant reportedly said, "If I let y'all in the house, I'm not going to be sitting well." A deputy was dispatched to obtain a warrant.

The sheriff's deputy prepared an affidavit to support his request for a search warrant to search appellant's residence. The items supposedly concealed there were contained in a list predrafted in the sheriff's computer for use in drug cases. The three-paragraph list of items expected to be in appellant's residence were:

1. Narcotics and/or compounds or derivatives thereof;

2. Scales, books, papers, records or narcotics notations, plastic baggies and any items which would be used to ingest narcotics and/or dangerous drugs into the human body.

3. Personal property tending to show residence on the premises and not limited to keys, safes, canceled mail, envelopes, rental agreements, receipts, bills for telephone and utility services, photographs, ledgers, phone lists, records of ownership to vehicles and personal property including clothing and/or jewelry, and any and all U.S. currency related to narcotics, any and all keys belonging to safe deposit boxes, bank books, bank records, ledgers (as it has been my training and experience that subjects dealing in profits keep ledgers), personal property affects such as non-cash items used to pay for narcotics, such as

radios, scanners, jewelry, televisions, firearms, etc.

The deputy testified at the suppression hearing that these items were listed in the computer based upon training and experience as to what officers could reasonably expect to find during drug-related searches; the sheriff's office considered this "standard language" used in all drug cases. The facts listed in support of the application for a search warrant were the overhead sighting of marijuana plants, the subsequent location on the ground of the five containers of such plants, the encounter with appellant at his door and his admission of [**469] ownership of the trailer but not the plants, the request for consent to search appellant's premises, and the denial of that request.[1] The warrant was granted to the deputy, and it was executed that [*334] day, locating the items that led to the additional charges and eventual convictions. Among the items found were guns and ammunition, cocaine, methamphetamine, marijuana, paraphernalia, and large sums of cash. A motion to suppress was heard and denied.

When this court reviews a trial court's ruling on a motion to suppress, we review the evidence and make an independent

---

[1] We deem it important to point out that appellant's assertion of his constitutional right to deny consent to search his residence does not supply probable cause to search. *See, e.g., Florida v. Bostick,* 501 U.S. 429 (1991) (holding that a suspect's mere assertion of constitutional rights cannot constitute the sole basis for establishing probable cause to conduct a search); *United States v. Hyppolite,* 65 F.3d 1151 (4th Cir. 1995) (holding that the mere assertion of the constitutional right to refuse consent to search does not supply probable cause to search); *Snow v. State,* 84 Md. App. 243, 578 A.2d 816 (1990) (holding that the driver's refusal to consent to search of his automobile did not give rise to reasonable suspicion that the vehicle contained narcotics).

determination based upon the totality of the circumstances. *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). We will reverse a trial court's ruling on a motion to suppress only if the ruling was clearly erroneous. *Id.*

Appellant attacks this warrant on the basis that the affidavit did not establish reasonable cause to believe that the items listed in the affidavit would be found inside the house. Appellant cites to Arkansas Rule of Criminal Procedure 13.1(b) (2000), which provides:

> The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not [**470] require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

The test for adequacy of the affidavit set out in *Illinois v. Gates*, 462 U.S. 213 (1983), and adopted by our supreme

court in *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983), was recently quoted in *State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999), whereby:

> [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed. *State v. Mosley*, 313 Ark. 616, 856 S.W. 2d 623 (1993); *Rainwater v. State*, 302 Ark. 492, 791 S.W.2d 688 (1990).

State v. Rufus, 338 Ark. at 312. Although the existence of a fact may be proved by circumstances as well as by direct evidence, the circumstantial evidence must be sufficient to lead to the inference. *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). Where circumstantial evidence is relied upon to establish a fact, the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to [*335] create the basis for a legal inference and not mere suspicion. *Id.*

Appellant argues that the search warrant should not have been issued because it could not be inferred from the affidavit that the items listed in the warrant could be found in appellant's home. Thus, he argues that this warrant was based upon speculation and conclusory language, not facts. Appellant recognizes that computer-generated language is not fatal per se when that language is coupled with additional facts to support a reasonable belief that contraband will be found. *See, e.g., Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992). However, he notes that the success of the search will not vali-

date the search if it was unlawful in its inception. *Willett v. State*, 298 Ark. 588, 769 S.W.2d (1989); *Walton v. State*, 245 Ark. 84, 431 S.W.2d 462 (1968).

[**471] The State, while not agreeing that the warrant was deficient, asserts that the "good-faith exception" enunciated in *United States v. Leon*, 468 U.S. 897 (1984), would support denial of the motion to suppress. Therefore, it posits that if the officers relied in good faith on the issuance of the search warrant by the magistrate based upon the magistrate's flawed determination of probable cause, then the fruits of the search are not subject to suppression. In answering whether the officer is acting in good faith, the analysis requires an objective standard, which requires the officers to have a reasonable knowledge of the Arkansas Rules of Criminal Procedure. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993). We agree with the State that the good-faith exception would support the denial of suppression in this instance. Thus, we need not address the existence of probable cause to issue the warrant.

The State points us to the holding in *Yancey, supra*, as support for that proposition. In that case, our supreme court refused to suppress evidence seized in searches of the homes of two suspects, which were located approximately five miles away from where the suspects were observed watering some marijuana plants, based upon the officers' good-faith reliance on a warrant, although the warrant was invalid because it had been issued without probable cause.

Appellant counters that this affidavit was so lacking in probable cause as to render official belief that probable cause resides in it entirely unreasonable, and thus the exclusionary rule should still apply. Appellant notes that there are four errors, noted in *Leon*, which an officer's objective good faith cannot cure. These errors occur (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) when the affidavit is so lacking in indicia of probable

cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. *Leon*, 468 U.S. at 914-15. Appellant argues that "it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued," and that these are such circumstances. *Leon*, 468 U.S. at 922; *see also Bennett v. State*, 345 Ark. 48, 44 S.W.3d 310 (2001). We disagree with appellant.

The knowledge of the police here was that there were growing marijuana plants in plain view on a trailer bed approximately 100 feet from the residence on appellant's property. Appellant was at home in his residence and claimed ownership of the trailer. Though the sheriff believed he already had probable cause to search, the law [**473] enforcement officers waited [*336] until they had procured a warrant before searching the premises.

The purpose of the exclusionary rule is to deter police misconduct. *Landrum v. State*, 326 Ark. 994, 936 S.W.2d 505 (1996). Because the goal of the exclusionary rule is to deter future police misconduct, it only makes sense to apply the rule where its application has a deterrent effect, and where the officers acted in objective good faith or where the transgressions are minor, the magnitude of the benefit conferred upon guilty defendants offends the basic concepts of the justice system. *Leon, supra; Yancey, supra.* In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically correct. *Leon, supra.* Thus, once the warrant issues, there is literally nothing more the officer can do in seeking to comply with the law. *Leon, supra. See also Starr v. State*, 297 Ark. 26, 759 S.W.2d 535 (1988). We affirm the trial court's denial of the motion to suppress.

In his second point on appeal, appellant argues that the trial court did not exercise its discretion or abused its discretion when it sentenced him to consecutive prison terms, con-

trary to the jury's recommendation that the sentences run concurrently and with rehabilitation. We disagree with his contention. Arkansas Code Annotated section 5-4-403 (Repl. 1997) states in part that "when multiple sentences of imprisonment are imposed on a defendant convicted of more than one offense ... the sentences shall run concurrently unless the court orders the sentences to run consecutively." Appellant concedes that it is solely within the trial court's discretion whether to sentence a defendant to serve concurrent or consecutive sentences, but argues that the trial court did not exercise its discretion or, alternatively, abused its discretion in mandating that his sentences run consecutively for forty-one years.

The sentencing hearing included testimony from appellant, his family, and friends, who all stated that appellant was a good person who had a drug addiction. That addiction had cost him his last marriage and a great deal of money. Appellant desired rehabilitation to assist in freeing himself of the addiction. The jury deliberated on his sentences, writing on the forms that appellant be sentenced to ten years on each of the drug charges "concurrent with rehabilitation." On the possession-of-a-prohibited-weapon conviction, the jury wrote "suspended sentence." The trial judge read these forms, stated that they were not in compliance with the law, and sent the jury back to deliberate further. The jury returned the forms with [**473] the same notations, with the exception of the verdict form on the possession-of-a-prohibited-weapon charge, upon which the jury noted a one-year sentence but added the word "(concurrent)." The jury also recommended in writing that appellant be eligible for transfer.

The trial judge stated that he would ignore the notations. The trial judge pronounced judgment of four ten-year sentences and one one-year sentence, to run consecutively. A posttrial motion to reconsider sentencing was filed to which appellant attached a document with ten of the twelve jurors' signatures on it recommending that the sentences run concurrently. The motion went unanswered and was deemed denied.

The appellant, by challenging this determination, assumes the heavy burden of showing that the trial judge failed to give due consideration in the exercise of his discretion. *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996). There is nothing in the record to demonstrate that [*337] the trial judge did not exercise his discretion. Indeed, he obviously exercised discretion when he departed from the jury's recommendation. It is when the trial judge has a standard manner of sentencing or merely implements whatever the jury wants that the appellate court steps in and remands for resentencing. *See, e.g., Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980); *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985); *see also Blagg v. State*, 72 Ark. App. 32, 31 S.W.3d 872 (2000) (holding that the trial judge stated that the ultimate decision would be made by the court, thereby indicating his understanding that the jury's recommendation was purely advisory). Considering that these sentences were within the statutory maximum and minimum and the trial judge contemplated whether to "stack" them or not, it is abundantly clear that the trial judge exercised discretion when sentencing, and we cannot say that the trial court abused it in that exercise.

Affirmed.

CRABTREE and ROAF, JJ., agree.

APPENDIX B

Suppression Hearing Proceedings
(March 8, 2001; Ark.S.Ct. Record)

Before the proof, Record at 65:

MR. WRIGHT (Prosecuting Attorney): As I understand the motion, Your Honor and I think I may can save us a little bit of time. The motion is going only to the probable cause to obtain the warrant, not anything concerning the execution of the search warrant; is that right, Mr. Goodson? . . .

MR. GOODSON (Defense Counsel): That's exactly correct, Mr. Wright.

Argument, Record at 125-26:

MR. GOODSON: [W]e filed a motion to suppress the search based on the insufficiency of the probable cause affidavit that was filed to secure the warrant in this matter. . . .

MR. WRIGHT: [T]he State has shown that the basis of the search warrant was information the officers obtained not only from the air by the helicopter but also on the ground. A trailer within a hundred feet of a home along with a water hose coming from the home to near the trailer all indicates that the officers had reasonable cause to believe that there may be drugs in the house and that's what the Arkansas law requires. It be reasonable cause to believe that there may be other controlled substances in the home and that enables the officers to be able to obtain a search warrant which they did. We believe they certainly had probable cause to proceed to issue the search warrant.

. . .

THE COURT: The motion to suppress is denied.